



State of New Jersey
Board of Public Utilities
Two Gateway Center
Newark NJ 07102

DAVID KATZ, ON BEHALF OF)	Office of Cable Television
HIMSELF AND ALL OTHERS)	
SIMILARLY SITUATED,)	
)	
Plaintiffs)	ORDER ON INTERLOCUTORY
v.)	REVIEW MODIFYING ADMINISTRATIVE
)	LAW JUDGE'S DENIAL OF SUMMARY
COMCAST CORPORATION; COMCAST)	DECISION BY THE GRANT OF PARTIAL
CABLEVISION OF BURLINGTON)	SUMMARY DECISION
COUNTY, INC.; COMCAST)	
CABLEVISION OF CENTRAL NEW)	
JERSEY, INC. COMCAST CABLEVISION)	BPU Docket No. CO99070481
OF GLOUCESTER COUNTY, INC.;)	OAL Docket No. CTV 10493-99
COMCAST OF JERSEY CITY, INC.;)	
COMCAST CABLEVISION OF THE)	
MEADOWLANDS, INC; COMCAST)	
CABLEVISION OF MERCER COUNTY)	
INC.; COMCAST CABLEVISION OF)	
MONMOUTH COUNTY, INC.; COMCAST)	
CABLEVISION OF NEW JERSEY, INC.;)	
CABLEVISION OF NORTHWEST N.J.,)	
INC.; COMCAST CABLEVISION OF)	
OCEAN COUNTY, INC.; COMCAST)	
CABLEVISION OF THE PLAINFIELDS.)	
INC.; AND ABC ENTITY NOS.1-100)	
(FICTITIOUS NAMES),)	
)	
Defendants)	

(SERVICE LIST ATTACHED)

BY THE BOARD:

On March 29, 2000, the Board granted Comcast Corporation's (Comcast) request for interlocutory review of a ruling by Administrative Law Judge (ALJ) William Gural in which ALJ Gural denied Comcast's motion for summary decision in this case.

By way of background, this proceeding originated before the Superior Court of New

Jersey, Essex County, as a class action filed by David Katz on behalf of himself and others similarly situated challenging the reasonableness of late fees charged by Comcast to its cable television customers. Katz v. Comcast Corporation, et al, Superior Court of New Jersey, Law Division, Essex County, Docket No: ESX-L-11401-98. Upon motion by the Board and subsequent agreement of the parties, the Superior Court transferred the matter to the Board for disposition of those issues within the primary jurisdiction of the Board.

On July 1, 1999, Mr. Katz's complaint was transferred by the Board to the Office of Administrative Law (OAL) where it was assigned to ALJ Gural for hearing as a contested case. On October 6, 1999, Comcast filed a Motion for Summary Decision (Motion) which was then forwarded by the Board to the OAL for disposition.

At a prehearing conference on February 17, 2000, ALJ Gural indicated his intention not to grant Comcast's motion for summary decision and, in a Prehearing Order dated February 24, 2000, he formally denied the Motion. ALJ Gural reasoned that the case must go forward so as to develop a factual record. In its interlocutory appeal to the Board, Comcast seeks reversal of that determination and urges the Board to grant summary decision dismissing the complaint.

POSITION OF COMCAST

Comcast argues that all late fees it has charged customers have been authorized by tariffs on file with the Board. Consequently, Comcast asserts that the filed tariff doctrine, which it contends protects the filed rate from subsequent ratepayer challenge, is dispositive of the issues in this proceeding and mandates summary disposition.

In addition, Comcast argues that, contrary to Mr. Katz's contention, it is not necessary to develop on the record the manner in which Comcast "calculated" its late fees in order to determine whether there has been compliance with N.J.A.C. 14: 18-3.24 since the late fees at issue are simply flat dollar amounts and no calculation, beyond adding the late fee amount to the customer's bill, is necessary.

Finally, Comcast takes issue with Mr. Katz's reliance upon a "fraud" exception to the "filed tariff doctrine." While denying any fraudulent act on its part, Comcast argues that, even were fraudulent conduct to be found, the case cited by Mr. Katz to support a fraud exception to the filed tariff doctrine is inapplicable. Comcast notes that Nordlicht v. New York Telephone, 617 F. Supp. 220 (S.D.N.Y. 1985), aff'd 799 F. 2d. 859 (2d Cir. 1986), cert. denied, 479 U.S. 1055, 107 S.Ct. 929, 93 L.Ed. 2d 981 (1987), the judicial decision relied upon by Mr. Katz, contains mere dictum related to a fraud exception since the fraudulent claims in that case were ultimately dismissed. Porr v. NYNEX, 660 N.Y.S. 2d 440, 445 (N.Y. App. Div. 1997). Comcast also points out that a subsequent judicial decision referred to Nordlicht as only "superficially" supporting a fraud exception to the filed

rate doctrine . Wegoland, Ltd. v. NYNEX Corp. 806 F. Supp. 1112 (S.D.N.Y. 1992), aff'd 27 F.3d 17 (2d Cir. 1994). Comcast further cites a string of later cases which it claims demonstrates that there is no fraud exception to the filed rate doctrine. Porr, supra; Bryan v. Prudential Ins. Co. of America, 662 N.Y.S.2d 44,45 (N.Y. App. Div. 1997) (filed rate doctrine would bar plaintiff's consumer fraud claim); Mobley v. AT&T Corp. 717 So.2d 367 (Ala. 1998) (customers' fraudulent misrepresentation action against long distance telephone company barred by filed rate doctrine); Day v. AT&T Corp., 63 Ca. App. 4th 325, 336 (Ct.App. 1998) (fraud claims are barred by the filed rate doctrine if based on the propriety of a utility's billing practice); Commonwealth v. Anthem Insurance Companies, Inc. 1999WL 252393, (Ky. App. 1999)(there is no fraud exception to the filed rate doctrine to save suit from dismissal), Wegoland, supra at 20 (a fraud exception to the filed rate doctrine is both contrary to guiding Supreme Court precedent and important regulatory policies).

POSITION OF DAVID KATZ

David Katz alleges that Comcast exacted payment of late fees unlawfully and fraudulently by (1) failing to disclose that late fees would be charged, (2) concealing the true costs of collection; and (3) concealing the manner in which the late fee is calculated. (Katz Brief at 4,7,8). Based upon this alleged fraudulent activity on the part of Comcast, Mr. Katz claims a fraud exception to the filed tariff doctrine. As previously noted, Mr. Katz relies upon the case of Nordlicht v. New York Telephone Co., supra.

Mr. Katz further argues that a factual record is necessary to demonstrate that:(1) the late fees charged by the Comcast companies in New Jersey are excessive and unrelated to the actual costs incurred by them in processing and collecting late payments and constitute an unlawful penalty, and (2) the actual calculation and disclosure of late fees by Comcast has not been in accordance with Board rules, specifically N.J.A.C. 14:18-3.24.

POSITION OF RATEPAYER ADVOCATE

By letter dated November 18, 1999, the Ratepayer Advocate (Advocate) opposed the grant of summary judgment, citing the Nordlicht v. New York Telephone case, supra, as establishing a fraud exemption to the filed tariff doctrine. The Advocate further argued that factual hearings are necessary to determine if Comcast failed to specify the method of calculation of its late fee, as required by N.J.A.C. 14:18-3.24(b).

DISCUSSION AND CONCLUSIONS

The standards governing the grant of summary decision are set forth in N.J.A.C. 1:1-12.5

(b) which provides in pertinent part, that:

The decision sought may be rendered if the paper's and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issues as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

A genuine issue of fact is defined in terms of a prima facie case standard. A party resisting a motion for summary decision must therefore make a showing, based on evidence submitted and all legitimate inferences, sufficient to require submission of the issue to the finder of fact. See Annot., R.4-46-2; Brill v. Guardian Life Ind. Co. of America, 142 N.J. 520 (1995).

In light of the above standard, it is necessary to determine whether any material fact is in dispute. A review of the complaint and the moving papers reveals the following: Mr. Katz does not allege that late fees charged by Comcast have been any other than those reflected in Comcast's filed tariffs. There is, therefore, no dispute as to such issue. Rather, he argues that (1) the late fees are unreasonable; (2) Comcast has not set forth on the customer's bill a calculation justifying the late fee in terms of Comcasts' costs; and (3) Comcast did not clearly specify the amount of any late fees charged on customer bills nor give prior notice to customers.

To the extent that Katz is attempting to demonstrate that the late fees, reflected in filed tariffs, are themselves excessive or unreasonable, the Board FINDS such claim barred, as a matter of law, by the filed tariff doctrine and no factual issue remains. The filed tariff doctrine is one of long standing and has been applied even in situations where the ultimate result might appear harsh. Indeed, the Supreme Court of the United States has held that a ratepayer is barred from claiming entitlement to a rate lower than that filed by a regulated entity with its regulatory agency despite the fact that it may have in good faith negotiated a lower rate or had been misled by the regulated entity in its rate quotes. See Texas & Pacific Railway Co. v. Mugg, 202 U.S. 242, 26 S.Ct. 628, 50 L.Ed. 1011 (1906); Louisville & Nashville Railroad Co. v. Maxwell, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 579, 101 S.Ct. 2925, 2931, 69 L.Ed. 2d 856 (1981). Stated simply, regulatory agency approval establishes the lawfulness of the rate charged and the rights of litigants must be determined solely by the filed rate. See Keogh v. Chicago & N.W. Railway Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922);

Essex County Welfare Board v. New Jersey Bell Telephone Bell Co. 126 N.J. Super. 417, 421 (App. Div. 1974). New Jersey Bell Telephone Co. v. Town of West Orange 188 N.J. Super. 455, 459 (App. Div. 1982) cert. denied 93 N.J. 283 (1983).

It should be noted that Mr. Katz does not claim that the filed tariff doctrine is inapplicable to the facts at hand, but argues for a fraud exception to such doctrine. With respect to Mr. Katz's reliance upon a "fraud exception," we need not reach the issue of whether such an exception exists since we do not find in Mr. Katz' argument a prima facie showing that Comcast has engaged in fraudulent behavior. As noted above, the late fees charged by the Comcast Respondents were those which were set forth in tariffs on file with this Board. Also, with respect to Katz's contention that Comcast fraudulently failed to give its customers notice of the possibility of late fees being assessed, ratepayers are deemed to have notice of charges and rates reflected in filed tariffs. See MCI Telecommunications Corp. v. Graphnet, Inc., 881 F.Supp. 126, 132 (D.N.J. 1995) (customers are charged with knowledge of tariff rates); Marcus v. AT&T Corp., 138 F.3d 46, 63 (2d. Cir. 1998); Porr, supra, at 448. Consequently, with respect to the lawfulness of the late fees charged by Comcast as set forth in tariffs filed with this Board and the adequacy of prior notice to customers, summary decision is GRANTED in favor of Comcast.

In addition to the above arguments, Mr. Katz also contends that Comcast has engaged in behavior violative of existing Board rules. Katz argues that Comcast has failed to disclose, on customer bills, a calculation setting forth the costs upon which its late fees are based. This allegation appears to be based upon a misreading of N.J.A.C. 4:18-3.24(a). That regulation states that:

In the event a cable television operator imposes an additional fee or charge or penalty to a subscriber for billing balances which are considered past due or late, the cable television company shall clearly specify the amount of the fee, charge or penalty on the subscriber bill. The cable television company shall also specify the method of calculation of the fee, charge or penalty on the bill.

(emphasis added)

The calculation required under this regulation is one which unbundles the charges related to service from those related to late fees, not a calculation disclosing the operating costs justifying the level of a late fee, already deemed lawful by virtue of its filed tariff status. Consequently, to the extent that Mr. Katz's allegations are based upon a different calculation than that contemplated by the Board under N.J.A.C. 4:18-3.24, summary decision is GRANTED in favor of Comcast on such issue.

Notwithstanding the issues resolved herein by summary decision, there are other factual

issues which require further hearings. No customer bills were submitted by either party. It remains unclear, therefore, whether the type of calculation, as described above, which would unbundle service charges from late fee charges was in fact set forth on bill statements and whether such charges were "clearly specified" as required under N.J.A.C. 14:18-3.24(a). With respect to these issues, summary decision is DENIED and the matter returned to the OAL for hearing in accordance with this Order.

Finally, the Board is cognizant of Mr. Katz's concern with the late fee issue on a going forward basis. Indeed, over the last few years, this Board has initiated rulemaking proceedings designed to establish maximum late fees for cable companies. The Board's ruling herein does not detract in any way from the Board's continuing efforts in this regard. The Board will be resuming its rulemaking activities on the late fee issue, at which time all interested parties, including the Complainant herein, will have the opportunity to present their comments and concerns on a going forward basis.

DATED: May 30, 2000

BOARD OF PUBLIC UTILITIES
BY:

(signed)

HERBERT H. TATE
PRESIDENT

(signed)

ATTEST:

CARMEN J. ARMENTI
COMMISSIONER

(signed)

(signed)

FREDERICK F. BUTLER
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